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NO. 82-1588

In the Supreme Court of the United States

October Term, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation

RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

Appellee,

vs.

LEE M. SCARBOROUGH & COMPANY,

Appellant.

On Appeal From The
Supreme Court of Wisconsin

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, Supreme Court Rules, Appellees All-Star Insurance Corp., in Liquidation, and Roderick B. McNamee, Special Deputy Commissioner of Insurance for the State of Wisconsin, respectfully move for an Order affirming the Judgment on the grounds that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT

Appellee McNamee, the Special Deputy Commissioner of Insurance of the State of Wisconsin, was the Liquidator of All-Star Insurance Company. Appellant as an agent, marketed All-Star insurance policies in Louisiana prior to liquidation. Although Appellant's contacts with Wisconsin did not involve maintenance of a business address, ownership of property or the presence of employees or agents in Wisconsin, it regularly conducted business with All-Star in Wisconsin through the mails and by using the telephone (App., pp. 12A-13A).

Appellee commenced this lawsuit to collect approximately $72,000 for premiums remaining unpaid for insurance policies issued by Appellant for All-Star on open account and for return of unearned commissions. Jurisdiction over Appellant's person was based upon Wis. Stats. §645.04(5)(a), which is part of the Wisconsin Statutes pertaining to liquidation of insurance companies. These statutes have similar counterparts in the statutes of other states. *In re Liquidation of All-Star Ins. Corp.* v. *Lee M. Scarborough & Co.*, 110 Wis.2d 72, 327 N.W.2d 648 (1983) (App., p. 6A).

For many years this Court and Congress have recognized that the regulation of the insurance industry is to be primarily accomplished by the several states. Section 2, McCarran Ferguson Act, 15 U.S.C. §1012; *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946); *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453, 457-58 (1969); *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 235-38 (1979). Of course, Appellees do not contend that this would immunize the states from compliance with due process of law. But the above decisions illustrate what does and does not constitute the business of insurance for

purposes of state regulation.

Appellant's thesis in pursuing this appeal is that the relationship between an insurer (All-Star) and its agents (Appellant Scarborough) is dissimilar to the relationship between an insurer and its policyholder, thus attempting to distinguish *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957). However, the attempt to distinguish *McGee* fails. All-Star's policies which were marketed in Louisiana and elsewhere spread the risks of those policies not only in Louisiana but in other areas where All-Star conducted business. When insurers are liquidated, it becomes necessary to collect assets of the insurer and divide them among the policyholders who present claims. This is not only in the interest of Wisconsin residents, but the residents of other states who present claims in the liquidation. The interstate judicial system's interest in the most efficient resolution of controversies and the states' interest in furthering fundamental social policies, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980); *Kulko* v. *California Superior Court*, 436 U.S. 84, 92 (1978), would be adversely affected by overturning the decision of the court below. If *McGee* does not apply to cases such as this, the economy and efficacy of state liquidation of insurers for the benefit of the public would be jeopardized (App., pp. 9A-12A).

Appellant claims error by the Wisconsin Supreme Court by focusing on the alleged absence of its contacts with the forum state. However, the question is whether or not the exercise of jurisdiction is reasonable and in accordance with "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292-94 (1980). Physical presence is not required; the defendant need only act indirectly in the

state. *Wisconsin Electrical Mfg. Co., Inc.* v. *Pennant Products, Inc.*, 619 F.2d 676, 678 n.6 (7th Cir. 1980).

In this case, the exercise of jurisdiction was reasonable. Appellant purposefully involved itself in a substantial agency relationship with a Wisconsin insurer selling policies in a number of states. It knew or should have known of its potential involvement in liquidation proceedings if the insurer it represented as an agent became insolvent. Appellant argues (Juris. Statement, p. 8) that the only evidence on the issue of personal jurisdiction was the affidavit detailing the lack of its physical presence, but nowhere does it deny the presence of numerous mail and telephone contacts with All-Star in Wisconsin, contacts which were necessary for Appellant to conduct its agency business, earning revenues by marketing insurance policies issued by All-Star in Wisconsin.

The only case considering insurance of any sort Appellants cite is *Capitol Indemnity Corp.* v. *Certain Lloyds Underwriters*, 487 F.Supp. 1115 (W.D. Wis. 1980). However, that case relied upon Wisconsin's general long arm statute, Wis. Stats. §801.05, and not the statute involved in this case, which pertains to liquidations. Moreover, the dispute was between private parties and did not involve the public policy considerations which apply when a state agency finds it necessary to liquidate an insurer which issued policies in many states. The case Appellants cite (Juris. Statement, p. 11) involving private contracting parties are not based upon these public policy considerations.

Appellant's argument that it must purposefully avail itself of doing business in the forum state misses the mark. While that may arguably be true of ordinary lawsuits in-

volving private parties, *e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235 (1958); *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980), such is not the case for insurance or other matters that involve areas of special state concern. As stated in *Lakeside Bridge, supra*, at p. 600, n.6:

> "[The United States Supreme Court] characterized *McGee* as being a case in which the out-of-state defendant 'engaged in an activity that the State treats as exceptional and subjects to special regulation.'"

See also, *Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Aldens, Inc.* v. *Packel*, 524 F.2d 38, 42-3 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Armed Forces Cooperative Insuring Assn.* v. *Department of Insurance, State of Wyoming*, 622 P.2d 1318 (Wyo. 1981), *appeal dismissed*, _____U.S._____, 102 S.Ct. 985 (1982); *I.T. Sales, Inc.* v. *Dry*, 222 Va. 6, 278 S.E.2d 789 (1981).

Nor can the decision in *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957) be limited to suits by insureds against insurers. *McGee* was based upon policy considerations relating to state regulation of insurance. Its rationale applies to other areas which concern governmental and regulatory matters not ordinarily involved in disputes between private parties. The agency contracts between All-Star and Appellant had a substantial connection with Wisconsin. Considering the interests of Wisconsin (and other states) in the orderly and efficient liquidation of an insurance company, there is nothing unreasonable in its exercise of jurisdiction over the person of Appellant.

CONCLUSION

The decision of the Wisconsin Supreme Court was clearly correct. The Judgment should be affirmed.

Dated: April 20, 1983.

Respectfully submitted,

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